2008

Friends of Maple Mountain, Inc., a Utah nonprofit corporation, and Jim F. Lundberg, an individual v. Mapleton City, a Utah body politic Wendell A. Gibby and Trudy Gibby, individually, and as co-trustees of the UVRA, Inc., Wag Pension Trust and MCBRS, LLC : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

FRIENDS OF MAPLE MOUNTAIN, INC., a Utah nonprofit corporation, and JIM F. LUNDBERG, an individual	:	
Plaintiffs/Appellants,	:	Supreme Court No.: 20080532-SC
vs.	:	District Court Civil No.: 070403029
MAPLETON CITY, a Utah body politic	:	
Defendant/Appellee.	:	
WENDELL A. GIBBY and TRUDY GIBBY, individually, and as co-trustees of the UVRA, INC., WAG PENSION TRUST and MCBRS, LLC,	:	
Intervenor-Defendants/Appellees.	:	

BRIEF OF APPELLANTS

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, HONORABLE DAROLD J. MCDADE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78A-3-102(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it failed to follow the precedent of *Mouty v. Sandy City Recorder*, 122 P.3d 521, 2005 UT 4 (Utah 2005).

This issue was preserved for appeal in various pleadings submitted to the trial court and in oral argument. (R. 381–83, Trial Transcript, hereafter "Tr." 911–16).

The standard of review for this issue is "correctness".

2. Whether *Citizens Awareness Now v. Marakis,* 873 P.2d 1117 (Utah 1994), fails to provide an appropriate analytical framework under which a court can determine whether city council action is administrative or legislative in nature.

This trial was all about application of the *Marakis* factors to the referendum sought by Friends of Maple Mountain, Inc. and Jim F. Lundberg. On this issue appellants ask that the Court revisit the analytical framework which it adopted in *Marakis.*

3. Whether the trial court erred in its conclusion that under the four-part analysis set forth in *Marakis*, the general purpose and policy of the newly enacted PD-2 zone in Mapleton City fits within the general purpose and policy of the existing CE-1 zone, such that creation of that new zone classification constitutes an administrative rather than a legislative function of the Mapleton City Council and thus is not referable.

This issue was preserved for appeal throughout the course of the six days of trial, in the pretrial and post-trial briefing and at closing arguments. Representative of this is the post-trial memorandum. (R. 371–81).

Appellants attack certain of the court's factual findings, which factual findings will only be overturned if they are clearly erroneous. The trial court's application of the law to those facts is evaluated on a "correctness" standard.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article V I, § 1 of the Utah Constitution provides:

> (1) The Legislative power of the State shall be vested in:
> (b) the people of the State of Utah as provided in Subsection (2).
>
> (2)(b) The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:
> (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.

2. *Utah Code Ann.* § 20A-7-601, *et seq.*

3. Mapleton Municipal Ordinances:

   a. Mapleton City General Plan - Land Use Element, adopted by Ordinance 2007-21 (Add. 16).

   b. Mapleton City General Plan 2007 Map, adopted by Ordinance 2007-21 (Add. 20).

   c. Mapleton Municipal Code, Chapter 180.30, CE-1 Critical Environment Zone (Add. 21).

   d. Mapleton Municipal Code, Chapter 180.78 PD Planned Development Zones (Add. 81).

   e. Ordinance 2007-17, PD-2 Zone Ordinance (Add. 39).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a decision by the Honorable Darold J. McDade in which he concluded that the general purpose and policy of a newly enacted zoning classification, the PD-2 zone, fits within the general purpose and policy of the existing CE-1 zone. Judge McDade concluded that the adoption of the PD-2 zone was an administrative act of the Mapleton City Council and thus not subject to appellants' proposed referendum petition by which appellants sought to have the adoption of the PD-2 zone ordinance submitted to the voters of Mapleton City.

B. COURSE OF PROCEEDINGS

Appellants Friends of Maple Mountain, Inc. and Jim F. Lundberg (collectively "Friends") filed a Verified Complaint on October 15, 2007, seeking a temporary restraining order and preliminary and permanent injunctions prohibiting Appellee Mapleton City ("Mapleton" or "City") from implementing a zoning change on certain real property (the "Gibby Property") owned by the Appellees/Intervenors (collectively "Gibby"). (R. 597). Friends alleged that Mapleton's PD-2 zone, created as a site-specific zone expressly for the Gibby Property, was subject to a referendum vote of the citizens of Mapleton, and that until such vote occurred, Mapleton and Gibby were precluded from implementing the PD-2 zone or developing the Gibby Property pursuant to that zone classification. (R. 597–96). The only relief sought in the complaint was injunctive relief. (R. 596). On the morning of October 15, 2007, Judge Claudia Laycock issued a temporary restraining order against Mapleton. (R. 596).

On his motion Gibby was allowed to intervene in the proceedings as the Gibby Property was at issue. (R. 596). Thereafter he filed an answer to the complaint. Mapleton filed an answer and counterclaim seeking declaratory relief on the issues of whether the challenged ordinance is referable and whether Plaintiffs gathered a sufficient number of signatures to place the matter on the ballot. (R. 596).

On Mapleton's motion, and after discussion among the parties and Court at an October 31, 2007, hearing, the parties stipulated that the preliminary injunction hearing and permanent injunction hearing/trial on the merits would be combined, and that the temporary restraining order issued on October 15, 2007, would remain in effect pending the conclusion of the trial. Thereafter the parties conducted expedited discovery. (R. 596).

Trial of the case started before Judge Fred Howard on November 21, 2007. (R. 596). During the presentation of evidence Judge Howard became aware of a potential conflict of interest, disclosed it to the parties and counsel on the record, and, at Friends' request, recused himself. (R. 596). The case then was assigned to Division 10, Judge Darold J. McDade. (R. 596).

Judge McDade held five more days of trial on December 5, 7, 12, 13, and 14, 2007, and the parties stipulated that the testimony of Camille Brown, City Recorder, given on November 21 before Judge Howard's recusal, would be used in transcript form at trial. (R. 595). The parties presented witnesses, exhibits, and legal briefs and written arguments to the Court. (R. 595). The Court heard oral arguments on January 18, 2008, (R. 595) and

issued its Findings of Fact, Conclusions of Law and Order on May 15, 2008. This appeal followed after the issuance of that Order.

C. STATEMENT OF FACTS

Most of the trial court's findings of fact are not in dispute in this appeal, Friends here sets forth those facts which they do not dispute, all of which are contained in the Trial Court's Findings of Fact:

1. Friends of Maple Mountain, Inc. is a Utah not for profit corporation located in Utah County, Utah. Jim Lundberg is an individual residing in Mapleton City, Utah County, Utah. (R. 595).

2. Mapleton City is a municipal corporation and political subdivision of the State of Utah. It is incorporated as a city of the third class and has adopted a six-member council form of government whereby the mayor and council form a unified governing body that jointly exercises both legislative and executive powers. (R. 595).

3. Wendell and Trudy Gibby and MCBRS, LLC, own approximately 118 acres of land along a small portion of the east bench of Mapleton City which has historically been zoned as Critical Environmental (CE-1) pursuant to Chapter 18.30 of the Mapleton City Code. (R.595–94).

4. The CE-1 zone classification allows reasonable residential development of property taking into account the unique features and characteristics of such property. (R. 594).

5. Over the past several years Mapleton and Gibby have been embroiled in several lawsuits over the development and use of the Gibby Property. For instance,

Mapleton has sued Gibby for a declaration that a certain trail which transverses the Gibby Property is a public right of way, and in the alternative, Mapleton sued Gibby to condemn the trail for public use. Mapleton also sought to condemn an easement for a water main across the Gibby Property. Gibby's lawsuits against the City include, among other things, a federal case alleging violation of his civil rights and a suit challenging the City's denial of his requests to re-zone the Gibby Property to something other than CE-1. (R. 594).

6. On May 15, 2007, after Mapleton had adopted a resolution approving such an agreement, Mapleton and Gibby entered into an agreement captioned "Memorandum of Understanding to Settle Pending Litigation and all Claims Known and Unknown" ("MOU"). The MOU was intended to resolve all pending legislative efforts and the ongoing litigation between the parties. (R. 594).

7. The MOU outlined the framework for a proposed re-zone of the Gibby Property. It also provided that, at no cost to the City, "the Gibby Parties agree to provide an easement for a trail from the north and south property lines of the Gibby Parties' property across the west escarpment of the property . . . ." The MOU also provided that "the Gibby Parties will grant an easement, at no cost to the City, for its water main." It also provided that the City will widen Dogwood Drive at the City's expense. (R. 594).

8. Thereafter, the City staff made various changes to the text of the ordinance as set forth at the July 17, 2007, City Council meeting. An updated draft of the ordinance was brought to the City Council for ratification at the Council's regularly scheduled August 21, 2007, meeting. After much discussion, the City Council voted 3-2 to approve the

proposed text of the PD-2 ordinance. This action effectively amended the existing development code to enact a new zoning designation entitled Planned Development-2 ("PD-2" zone). The ordinance was designated as Mapleton Ordinance 2007-17. Although the PD-2 zone was created, it had yet to be applied to the Gibby Property. (R. 593–92).

9. Also during the August 21, 2007, City Council meeting, the Council unanimously voted to amend the Land Use Element of the City's overall General Plan. (R. 592).

10. During the "public comment" portion of the August 21, 2007, City Council meeting, Appellants notified Gibby, the City Council, and Mapleton Mayor Jim Brady that Appellants and others opposed to the new PD-2 ordinance planned to file an application for referendum petition. (R. 592).

11. On August 23, 2007, the Gibby Parties pursued an application before the Mapleton Planning Commission to rezone the Gibby Property from CE-1 to the PD-2 Zone. The Planning Commission voted to give an unfavorable recommendation to the City Council regarding Gibby's request. (R. 592).

12. Gibby's rezone application and request came before the City Council on September 18, 2007, at a regularly scheduled meeting, and was unanimously approved subject to numerous conditions, including, but not limited to, final plat approval of Intervenors' proposed subdivision. (R. 592).

13. On September 18, 2007, Appellants requested referendum applications from the City. Appellants subsequently circulated the referendum petitions to various residents, and timely filed their original referendum petitions with the County Clerk (with copies to

the City Recorder) on October 5, 2007, forty-five (45) days after the enactment of the PD-2 ordinance. (R. 592).

14. Appellants commenced this action on or about October 15, 2007, and obtained a Temporary Restraining Order on October 15, 2007. (R. 591).

15. On October 18, 2007, the Utah County Clerk's office sent Mapleton City Recorder Camille Brown written certification that 2,973 was the total number of all votes cast in Mapleton City for all candidates for Governor at the 2004 election, that "[t]he number of petition signatures necessary was 1,041," and that "[t]he total number of certified signatures is 864 which does not equal the number required by [statute]." The Utah County Clerk's office instructed the City Recorder, "By statute, then, you must mark the petition as 'insufficient.'" (R. 591).

16. After consulting with legal counsel, Ms. Brown and Mapleton determined that it would be best to refer the disputed issue to the Court. (R. 591).

17. There was no real dispute among those involved in this litigation that the referendum sponsors followed all of the "technical" requirements of *Utah Code Ann.* § 20A-7-601, *et seq.* (R. 591).

18. Testimony from the trial verified that the referendum sponsors met the requirements of Section 602, which requires that the referendum petition have a copy of the challenged law attached and that it contain certain warnings to the potential signers of the petition; that the sponsors met the requirements of Section 604 concerning circulation of the petition; that a large number of signatures were obtained by the sponsors as required by Section 605; that the sponsors submitted the petitions to the County Clerk for verification

of the status of the signers of the petition as required by Section 606; that the petition was submitted to the County Clerk on October 5, 2007, 45 days after the adoption of the ordinance which was enacted on August 21, 2007; and finally that the County elections office certified 864 signatures and declared that 2,973 Mapleton voters cast ballots in the preceding gubernatorial election. (R. 591–90).

19. The evidence demonstrated that Plaintiffs obtained 864 certified signatures from a total of 2,973 voters in the preceding gubernatorial election, and that Plaintiffs gathered signatures of 29% of the registered voters. (R. 590).

20. The parties stipulated to the adequacy of notice under *Citizens Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994). (R. 590).

21. The legislative intent and general purpose and policy of the original zoning designation of the Gibby Property, namely CE-1, are set forth in Mapleton City Code § 18.30.010. (R. 590).

22. The Mapleton City Code ("MCC") provides, in pertinent part, that "the CE-1 zone includes those areas of the City which, as the result of the presence of steep slopes, soil characteristics, flood hazards, erosion, mud flow or earthquake potential, wildlife hazards or other similar natural conditions or environmental hazards are considered environmentally sensitive and fragile." MCC § 18.30.010 preamble. (R. 590).

23. The purpose of the CE-1 zone was not to ban development. (R. 590).

24. The text states that it is an attempt to "recognize and appropriately balance: 1) the need for preservation of the natural environmental conditions; 2) the need for mitigation of potentially adverse or unsafe conditions arising from development activities;

3) the protection of the interests of subsequent purchasers and occupants; and 4) the rights of current owners to the reasonable use of their property." MCC § 18.30.010.A. Development within "the natural limitations . . . of the environment was actually encouraged." Id. § 18.30.010.D. (R. 590–89).

25. Tom Nielsen, former Mapleton Planning Commission Member from 1984-1989 and member of the subcommittee that helped research and draft the original CE-1 zone, testified that when the CE-1 zone was originally enacted, its main purpose was to protect sensitive lands from the type of landslides Utah had recently experienced, to cover all potentially hazardous areas of Mapleton City, and to protect against various geological hazards that were thought to exist at that time. (R. 589).

SUMMARY OF THE ARGUMENT

When they adopted the Utah Constitution the citizens of the State reserved to themselves the power of direct legislation through referendum. That power belongs to the people. After Mapleton City adopted a new zoning classification, the PD-2 zone, Friends, with the signatures of 29% of the voters of the City, sought to exercise their power of referendum. They were thwarted by the City and rebuffed by the trial court when it issued an erroneous decision holding that application of the *Marakis* factors confirmed that the action of the city council was administrative in nature and thus, not referable. This Court must zealously protect Friends' constitutional right of referendum and resolve any reasonable doubts in favor of that right.

Fourteen years after *Marakis,* this Court, in *Mouty*, held that a zone amendment changing a prohibited use to now allow the use was a legislative act. In reaching that

conclusion the Court held that no *Marakis* analysis was needed because in *Mouty*, the council action was taken in a city with a strong mayor/council form of government and thus all actions of the city council by definition are legislative in nature. Friends asked the trial court to follow that precedent. If a zone change in one city is legislative in nature, a substantially similar zone change in another city, regardless of its organizational model, also must be legislative in nature. Differences in the form of government in two cities enacting substantially similar zone changes cannot provide a principled or reliable basis for different treatment. The trial court erred when it failed to follow the *Mouty* precedent.

This Court has repeatedly held in the context of direct appeals of zoning decisions that the adoption of a zone change or a zone classification is a legislative act. This is because, in adopting a *new* zone classification, a city council weighs competing interests in the community, evaluates growth patterns and makes other similar policy judgments. Only legislative bodies can make major policy decisions for a city. Thus, adoption of a new zone classification is the making of a new law rather than the implementation of an existing zoning law. As such it is legislative in nature. This Court should adopt that bright-line rule.

Marakis is unworkable because it does not recognize that the adoption of a new zoning classification is a legislative act. It also is unworkable because it does not provide individuals, cities and courts with an objective standard upon which to base a decision that a particular zone ordinance is referable. As an example, *Marakis* requires a trial court to evaluate whether a zone change ordinance is of such a complex nature that it is

not appropriate for voter participation. But *Marakis* provides a trial court no objective standard or measure for such analysis. In this case Friends asserted that the effect of the zone change was readily apparent and understandable by the general public because lay citizens could understand the significant differences between the two zones. Mr. Gibby argued that the matter was overly complex because it took sixteen separate geotechnical studies to determine that the property was fit for residential development. Because *Marakis* provides no guidance to trial courts on how they should evaluate whether a matter is too complex for citizen input, it places an undue burden on the constitutional right of referendum. As well, *Mouty* held that complexity is not an issue in a city with a strong mayor/council form of government. How and why should it be an issue in other cities with a different corporate model?

Marakis is unworkable because it treats citizens of some cities differently than citizens of other cities. Marakis requires a fact-intensive analysis, which always is costly. But that significant expense only falls on some of the citizens of the State. Others have access to their constitutional right of referendum without that expense. While there may be cases where a legislative/administrative distinction must be made, because adoption of a new zone classification is the making of a new law, that distinction did not need to be made in this case and the trial court erred when it did so.

Finally, the trial court erred in its evaluation of whether the general purpose and policy of the new PD-2 zone fits within the general purpose and policy of the existing CE-1 zone. While the trial court should have looked at the substantial body of evidence that Friends provided including the City Vision Statement, its General Plan and Map, the

text of the CE-1 zone and the text of the PD-2 zone, all the trial court did was contrast the preambles of the two zones, the CE-1 and the PD-2. The many documents described above identified a policy for the CE-1 zone of limited development on the hillsides, large lot sizes and frontages and significant slope protections. The new zone retained none of these. The General Plan provided that PD zones should be located in areas far from the Critical Environmental land use area but the new zone is a PD zone in that area. Had it properly considered all of this evidence the trial court would have upheld the right of referendum in this case. It erred when it failed to do so. Because of that error this Court must reverse.

ARGUMENT

I. WHAT IS NOT AT ISSUE.

Several matters are not at issue. The trial court concluded that Friends scrupulously followed all of the statutory requirements of *Utah Code Ann.* § 20A-7-601, *et seq.* in seeking the referendum. The trial court also concluded that the new zoning ordinance is not a land use law for purposes of the higher petition signature requirement. No one contests either of these conclusions of the trial court. Further, though the parties spent considerable time putting on evidence on material variance and appropriateness for voter participation, the trial court did not reach these issues. Because these issues were not decided by the trial court they are not the subject of this appeal.

II. THE REFERENDUM RIGHT IS A CONSTITUTIONAL RIGHT WHICH THIS COURT MUST JEALOUSLY PROTECT.

The Utah Constitution provides that "[t]he legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may (ii) require any law or ordinance passed by the law making body of the county, city, or town, to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect." UTAH CONST, art. VI § 1(2)(b)(ii). This right of the people to directly legislate is a right which our Supreme Court has held must be jealously guarded from encroachment.

> [T]he Utah Constitution vests the people's sovereign legislative power in both (1) a representative legislature and (2) the people of the State, in whom all political power is inherent. . . . Pursuant to article VI, section 1 of the Utah Constitution, the people exercise their direct legislative power through initiatives and referenda. . . . Article VI, section 1 is not merely a grant of the right to directly legislate, but reserves and guarantees the initiative *power* to the people. . . . The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share "equal dignity" . . . . Because the people's right to directly legislate through initiative and referenda is sacrosanct and a fundamental right, Utah courts must defend it against encroachment and maintain it inviolate.

Gallivan v. Walker, 2002 UT 89 ¶¶ 23, 27, 54 P.3d 1069 (Utah 2002).

Although the legislature has a role in creating the enabling legislation which defines and gives body and substance to the right of initiative and referendum:

> In carrying out this duty, the legislature may not "pass laws that unduly burden or diminish the people's right to initiate legislation." . . . Due to "the fundamental nature of the right of initiative . . . , the vitality of ensuring that the right is not effectively abrogated, severely limited, or unduly burdened by the procedures enacted to enable the right and to place initiatives on the ballot is of paramount importance."

Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State, 2004 UT 32 ¶ 29, 94 P.3d 217 (Utah 2004) (quoting *Gallivan v. Walker, supra*).

Within the last few months this Court again has expressed the fundamental nature of the initiative right (and its corollary right, referendum).

> The authority of the legislature to set conditions on the exercise of the initiative power by the people must be read in coordination with the other rights of the people expressed and reserved in the constitution. It is limited, as a consequence, to the role of providing for the orderly and reasonable use of the initiative power. It does not follow, logically or constitutionally, that the authority to set limits on *conditions*, *manner*, or *time* gives the legislature the broader authority to deny the initiative right to the people.

Sevier Power Company, LLC v. Board of Sevier County Commissioners, 2008 UT 72 (October 17, 2008) ¶ 10 (emphasis in original).

In this case all that Friends has sought is to exercise their right to direct legislation. The City wishes to adopt a new zoning classification. Friends asserts that the adoption of a new zone classification is the making of a new law, and therefore, legislative in character and subject to referendum. Yet, in order to vindicate this right Friends have expended tens of thousands of dollars in attorney's fees and have spent six days in a bench trial and now are prosecuting this appeal. All for a constitutional right, an important and fundamental constitutional right. "The referendum right [is] fundamental to our conception of government, [and it] should not and cannot be . . . easily thwarted." *Mouty v. Sandy City Recorder*, 2005 UT 4 ¶ 5, 122 P.3d 521 (Utah 2005). In its consideration of this case Friends asks that this Court remember the words of the California Supreme Court, quoted with approval in *Gallivan*: "[I]t is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in

favor of its exercise." *See Legislature v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309, 1313 (1991) (en banc).

III. THE TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW THE PRECEDENT OF *MOUTY.*

In *Mouty*, this Court upheld, as a legislative act of a city council, the amendment to a zoning classification in Sandy City. At trial Friends asked that the lower court follow that precedent as the facts of this case are strikingly similar to the facts in *Mouty*. However the trial court erred when it refused to follow *Mouty*. This court must correct that error and conclude that *Mouty* provides clear precedent that the action of the Mapleton City Council in adopting the PD-2 zone was a legislative act, and thus subject to referendum.

In *Citizens Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994), the Court adopted a four-part analysis to determine whether an action by a city council is an administrative or a legislative act. Almost the entirety of the 6-day trial in this case was spent introducing evidence on three of those four *Marakis* factors.[1] As discussed hereafter, the trial court erred in its *Marakis* analysis. However, as an independent basis for reversal, the 2005 case of *Mouty v. Sandy City Recorder* provides contours which give guidance in this case and which demonstrate the trial court's clear, reversible error when it rejected Friends' request to apply the precedent of *Mouty* to this case.

In *Mouty* this Court found that a city ordinance as to which a referendum was sought in fact was legislative in nature, the only post-*Marakis*, zoning related case that

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[1] Appellants do not and never did dispute that they had adequate notice of the city council actions rendering the first leg of the *Marakis* test a non-issue.

has done so.[2] Because the ordinance at issue in *Mouty* was found to be legislative in nature and thus referable, and because the ordinance in this case is significantly similar to that found to be referable in *Mouty*, the ordinance here also must be legislative in character and referable. This is so for several reasons:

Mouty, as the Court knows, concluded that in a city which uses, as its form of government, the strong mayor/council form described in and authorized by the Optional Forms of Municipal Government Act,[3] held that actions of the city council by definition are legislative in nature. Yet it simply cannot be the case that one city can adopt a zone amendment and the zone amendment will be legislative in nature because the city operates in a strong mayor/council form of government, while a smaller city with a six-member council adopts a virtually identical zone amendment, as was the case here, and the trial court properly concludes that the zone amendment was an administrative act. Such an outcome is neither legally tenable nor intellectually honest. Either an action is fundamentally legislative in nature or it is an administrative action. But the same action, taken in two different cities, does not have a different character by reason of the form of government of the council taking the action. To rule otherwise exalts form over substance.

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[2] After *Marakis* was decided in 1994, only two cases have found an ordinance as to which a referendum was sought to be legislative in nature: *Mouty* and *Low v. Monticello*, 54 P.3d 1153 (Utah 2002). *Low* was not a zoning related case.

[3] The 2008 legislature repealed the Optional Forms of Municipal Government Act and in lieu thereof adopted the Forms of Municipal Government Act, *Utah Code Ann.* § 10-3b-101, *et seq.*

Second, as the Court said in *Citizens for Responsible Transportation v. Draper City*, 2008 UT 43 ¶ 11, 190 P.3d 1245 (Utah 2008), "The determinative test in deciding whether an action is legislative or administrative in nature is whether it creates new law on the one hand, or merely executes or implements existing law on the other." *Mouty* makes clear that the adoption of an amendment to a zoning ordinance to change permitted uses for a zone classification that is site-specific is the creation of a new law—a legislative act. Thus, by the standard of *Citizens for Responsible Transportation*, in *Mouty* the zone change, as a matter of law, must have been the creation of a new law.

As demonstrated below, the zone change in this case is virtually identical to the type of zone change involved in *Mouty*. If treating like matters in a like fashion, which is what the common law development of the law is all about, means anything, then the zone change in this case, as was the zone change in *Mouty*, also must be the creation of a new law—a legislative act.

In *Mouty* the Court held that the proposed amendment to the zone category there, a change which would remove the restriction on big box stores in a site-specific zone, was the adoption of a new law, and thus referable. In the present case the zone change proposed by Mapleton City, as to which appellants sought a referendum, was the creation of a new zone classification or category to allow previously prohibited uses on a specific parcel of property and to remove restrictions on development in a site-specific zone. If *amending* a zone category to change a prohibited use to a permitted use is the making of a new law, then it follows that the *creation* of a new zone category to change prohibited uses and remove restrictions on development on a specific site also must be the creation

of a new law. In this case the trial court erred because it did not recognize that the creation of a new zone classification that changed prohibited uses to permitted uses was legislative in nature, even without reference to the four-part test of *Marakis*.

As is demonstrated in the following chart, the zone changes in *Mouty* and in the Mapleton case are virtually identical.

Mouty v. Sandy City Recorder	*Mapleton Case*
Zone before zone change: SD-X	Zone before zone change: CE-1
Length of time zone has existed: 16 years	Length of time zone has existed: 23 years
Parcel size: 100 acres	Parcel size: 118 acres
City size: 14,635 acres	City size: 7680 acres
Parcel size/City size: 0.6%	Parcel size/City size: 1.5%
Prohibited use: Big box store	Prohibited uses: No building in steep slopes and no significant development on hillsides.
Proposed zone change: Amend zone category to change prohibited to permitted use and allow big box store	Proposed zone change: Create new zone category to change from prohibition of hillside development to allow hillside development and to allow significant development in previously protected area

It does not take any imagination to see that the proposed zone changes in *Mouty* and in this case are nearly identical. Each involves a long-existing zone that consisted of a very large parcel, each proposed a change to the zone classification to change what had been a prohibited uses to now allow such uses. Given the controlling precedent of *Mouty* and notwithstanding *Marakis*, this Court must reverse the trial court and hold the zone change legislative in nature, and thus referable to the voters of Mapleton.

Given this analysis, the question may be asked: but what of *Marakis*? There are at least three salient responses:

First, as stated above, it simply cannot be the law that the form of government employed by a city determines whether an action by that city council is legislative or administrative. Yet that is exactly the outcome from the trial court's *Marakis* analysis. Something besides form of government must control the question of whether council action is legislative in nature. Here the only real distinction between what occurred in *Mouty* and what occurred in this case is the nature of the form of government of the two cities. That cannot provide a principled basis for the disparate treatment between virtually identical fact patterns in Sandy City and in Mapleton.

Secondly, and importantly, while application of the clear precedent of *Mouty* will obviate the need for a *Marakis* analysis in this case, the result should be the same. If a city council makes the policy decision to *change* the existing zoning law of the city by establishing an entirely new zone classification, that change must, by definition, be a shift in the then existing general purpose and policy of the existing zoning ordinance and also, a material variance to the existing zoning law. What existed before has been changed in major and important ways: in Sandy City a prohibited use on a matter of significant concern was changed to a permitted use in the zone. In Mapleton prohibited uses, densities, slope regulation and the like, again matters of significant concern, were addressed and allowed in the newly created zone. The clear and logical application and extension of *Mouty* is that the adoption of a new zoning classification by a city council, any city council, simply must be a legislative act, and therefore satisfies the framework upon which *Marakis* is built. That was what occurred in *Mouty*. It is what the trial court should have done in this case. In failing to do so the trial court clearly was wrong. This

Court should remedy that error by holding that the adoption of a new zone classification is the adoption of a new law, and thus referable. This can be accomplished without the need for a *Marakis* analysis.

Third, as set forth in Section IV below, *Marakis* cries out for some modification. It simply does not work the way the Court intended it to work.

IV. *MARAKIS* MUST BE DISTINGUISHED OR AMENDED BECAUSE ADOPTION OF A NEW ZONE CLASSIFICATION IS A LEGISLATIVE ACT.

Faced with the cases of *Bird v. Sorenson*, 394 P.2d 808 (Utah 1964) and *Wilson v. Manning*, 657 P.2d 251 (Utah 1982), each of which concluded that changing a residential zone to a commercial zone was an administrative and not a legislative act of the city, in *Citizens Awareness Now v. Marakis*, this Court adopted a formula of analysis that simply does not work. We urge the Court either to amend or distinguish *Marakis*.[4]

a. The Adoption of the New Zone Classification is the Making of a New Law That is a Proper Subject of a Citizen Referendum.

This Court has faced the question of whether adoption of a zoning ordinance is an administrative or legislative act in two different circumstances: 1) deciding whether a zoning ordinance is referable, and 2) resolving a direct judicial challenge to the adoption of a zoning ordinance. The result has been curious. In essentially every case in which the Court has looked at the administrative/legislative distinction in the context of a challenge to a zoning ordinance by a direct attack, the Court (and the Court of Appeals)

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[4] Frankly, in our view, the Court should distinguish *Marakis* or modify its analytical framework and overrule both *Bird* and *Wilson*. Neither of these earlier cases can stand a rigorous examination, particularly given the analysis and result in *Mouty*.

has held that the adoption of a zoning classification or the rezoning of a parcel of property is a legislative act. Cases which represent this view include:

Bradley v. Payson City Corp., 2003 UT 16 ¶ 11, 70 P.3d 47 (Utah 2003):

> There is no dispute in this case that the *enactment and amendment of zoning ordinances is fundamentally a legislative act. Sandy City v. Salt Lake County*, 827 P.2d 212, 221 (Utah 1992) ("[t]he passage of general zoning ordinances and the *determination of zoning policy [are] properly vested in the legislative branch*") (quoting *Scherbel v. Salt Lake City Corp.*, 758 P.2d 897, 899 (Utah 1988)). The political nature of the decision making process underlying municipal zoning demands that the power to make such decisions be vested in persons who are publicly accountable for their choices. *See Marshall*, 141 P.2d at 709 (noting that accountability for balancing competing interests in zoning decisions properly resides in the "governing body of the city"). (Emphasis added).

Harmon City, Inc. v. Draper City, 2000 UT 31 ¶ 18, 997 P.2d 321 (Utah App. 2000):

> We also reach this conclusion because the distinction between a municipality's legislative and administrative functions rests on an important principle: It is a legislative body's prerogative to determine public policy, a judicial body's job to interpret the policy, and an administrative body's job to enforce the policy. *Establishing zoning classifications reflects a legislative policy decision* with which courts will not interfere except in the most extreme cases. (Emphasis added).

Smith Investment Co. v. Sandy City, 958 P.2d 245, 251 n.6 (Utah App. 1998):

> A city council acts within its legislative function when passing a *zoning or rezoning ordinance. See Sandy City v. Salt Lake County*, 827 P.2d 212, 220 (Utah 1992); *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150, 1152 (Utah 1976); *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 301–03, 410 P.2d 764, 765–66 (Utah 1966); *Salt Lake City v. Western Foundry & Stove Repair Works*, 55 Utah 447, 452, 455, 187 P. 829, 830–31, 832 (Utah 1920); *see also 3 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning & Planning* 27A.04[3], at 27A- 35 n. 39 (1997) (Emphasis added).

In an apparent effort to explain the *Bird* and *Wilson* competing line of cases, the Court of Appeals in *Smith Investment* then said:

> In *Bird v. Sorenson,* 16 Utah 2d 1, 394 P.2d 808 (1964), the Supreme Court of Utah termed rezonings 'administrative' for purposes of holding them to be unfit subjects for referendum. For all other purposes, however, rezonings in Utah are characterized as legislative.

In short, this Court has consistently held, in all cases which look at whether an ordinance is administrative or legislative for all purposes other than whether an ordinance is referable, that adoption of zoning classifications is a legislative act.

Then came *Mouty*. In concluding that a zone change ordinance is referable because it was adopted by a city council in a city with a strong mayor/council form of government, the Court for the first time faced the essential fact: adoption of a zone change ordinance is legislative. Why? Because it was adopted by a legislative city council. Yet, it is difficult to discover a principled basis between what occurred in *Mouty* and what occurred in both *Bird* and *Wilson*. In each of these cases there was an amendment to the zone classification. In *Mouty* the change was to allow big box stores in a zone where such stores previously had been prohibited. In both *Bird* and *Wilson* the change was to rezone property from residential to commercial. Yet there simply is not a logically explainable basis for the completely different conclusions. And, as noted above, the form of government of the council involved cannot provide such a rationale. *Mouty* can be explained and harmonized with the just-quoted line of cases. It cannot be harmonized with either *Bird* or *Wilson*. That it cannot be harmonized with *Bird* or *Wilson* is telling.

In the language of *Citizens for Responsible Transportation*, "The determinative test in deciding whether an action is legislative or administrative in nature is whether it

creates new law on the one hand, or merely executes or implements existing law on the other." 2008 UT 43 ¶ 11. Making the policy decision to create a new zoning classification is the making of a new law, not the implementation of an existing law, because what is occurring is the adoption of a significant change to the zoning ordinance. Such changes by their very nature involve consideration and balancing of competing interests in the community, evaluation of growth patterns and where growth should be allowed to occur, analysis of why certain areas are better suited to specific uses than others, and a host of similar issues. At the heart of this evaluation is the exercise of judgment: Should the city create a new zone classification? In making that decision the city council is exercising a legislative judgment because these are important policy considerations. To use this Court's language from *Bradley*: "There is no dispute in this case that the enactment and amendment of zoning ordinances is fundamentally a legislative act." 2003 UT 16 ¶ 11. Not "sort of" or "partially" a legislative act, but "fundamentally a legislative act." Applied to this case, the adoption of a new zone classification is "fundamentally a legislative act." As such it surely must be referable.

The language of the Court of Appeals in *Harmon City, Inc.* resonates: "Establishing zoning classifications reflects a *legislative policy decision* . . . ." 2000 UT 31 ¶ 18 (Emphasis added). It resonates because this position is consistent with the long list of cases referred to above which have made exactly that point. It resonates because it recognizes the essential character of what a city council is doing when it adopts or amends a zone classification. It resonates because, at its core, it is accurate. And it resonates because, as this Court observed in *Sears v. Ogden City*, 572 P2d 1362, 1359

(Utah 1977): "The city performed a legislative function when they *weighed the public benefit of the ordinance*." (Emphasis added).

Because the creation of a new zone classification is a legislative act, when the Mapleton City Council adopted the PD-2 zone ordinance it was making a new law, a law which properly was referable to the citizens of Mapleton. Further, such a policy provides the kind of bright-line rule approved by this Court in *Mouty*.[5]

b. *Marakis* is Unworkable; the *Marakis* Analysis Must be Modified.

In *Citizens Awareness Now v. Marakis*, the Court, in an important effort to provide a standard by which trial courts can judge whether action taken by a city council is administrative or legislative, adopted a four-part, sequential test. Yet that standard is unworkable and must be amended.

i. *Marakis* is Unworkable Because it Does Not Recognize That Adoption of a Zoning Classification is a Legislative Act.

As set forth above, only a legislative body, acting in a legislative capacity, is empowered to make broad policy decisions for a municipality, decisions which include the creation of new zone classifications and which parcels in the city should be placed in specific zoning categories. *Marakis*, however, ignores this principle. Rather, in every

[5] "The above considerations, coupled with the unquestionable reality that a bright-line rule establishing which municipal acts are referable, would serve the interests of both the electorate and municipal governments, lead us to conclude that all acts taken by a city council in a city organized pursuant to the council-mayor form of government are necessarily legislative and subject to referenda." *Mouty* ¶ 36.

zoning case as to which a referendum is sought,[6] the *Marakis* test applies and requires extensive litigation. *Marakis* is unworkable and should be amended because even in those cases where it is clear that a new law is being adopted, parties are put to the expense of a *Marakis* analysis, an analysis which can reach the wrong result, as happened in this case.

Mouty and *Low v. Monticello*, 54 P.3d 1153 (Utah 2002), each demonstrate that cases and circumstances exist which render a *Marakis* analysis unnecessary. In *Mouty* a *Marakis* analysis was unnecessary because by definition the action of the Sandy City Council was legislative in nature. In *Low*, the Court concluded, based on prior precedent that "the decision to purchase or acquire a power system . . . is a purely legislative decision . . . . 54 P.3d at 1161. In this case this Court properly should conclude that a *Marakis* analysis is unnecessary if a new zoning classification is being created as a significant policy decision is being made by the city council. In making policy decisions the council is making a new law, not implementing an existing law. Adopting this rule would obviate a *Marakis* analysis in those circumstances when it really is clear that new law is being made. *Marakis* should be amended to provide this bright-line rule.

ii. *Marakis* Allows Impermissibly Broad, Subjective Judgments.

A second criticism of *Marakis* is that the analysis which it directs results in subjective evaluations by trial courts. Such evaluations lack the certainty and fundamental fairness which the protection of a fundamental constitutional right deserves.

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[6] At least every zoning case in which a referendum is sought that is not in a city with the strong mayor/council form of government at issue in *Mouty*.

For purposes of example we will refer to the fourth Marakis factor, "whether the zoning change implicates a policy-making decision amenable to voter control." *Marakis* at 1125. (We believe other *Marakis* analysis points, particularly the general purpose and policy analysis, also result in too subjective of a review.)

This test, as *Marakis* notes, requires the trial court to determine whether the proposed change is "of such complexity that it is not practical for the public to give it sufficient time and attention to make a proper determination of the matter." *Id.* But how is a trial court to determine whether a matter is so complex that it is not practical for voter participation?

This case demonstrates the problem. Mr. Gibby argued that the issue was too complex for voter participation because he had commissioned sixteen separate geotechnical studies about his property in the CE-1 zone. If a matter is so complex that sixteen different geotechnical studies were required, the matter must be too complex for the general voting public. Friends countered with evidence that the Mayor and the members of the city council never read any of these studies. (Tr. 734–35). Rather, the Mayor explained, they relied upon statements to them of the meaning of these studies provided by the City engineer. (Tr. 734–35). Additionally, Friends argued that the issue of the zone change had much less to do with what the sixteen studies describe about the Gibby property and much more to do with whether voters were comfortable with significant development in the Critical Environment land use area, whether they agreed with a change from essentially no development on the bench area to significant development there and whether a relaxing of the hillside protections was appropriate.

None of these issues are complex at all. They are precisely the kinds of policy judgments that legislative bodies make when making zoning decisions. Friends argued that there is a certain arrogancy in claiming that these kinds of questions are too complex for voter participation. But more than that, there is no objective standard by which a trial judge can judge whether a matter is too complex for voter participation. Finding of Fact # 36 demonstrates that this trial judge thought the matter was too complex for voter participation. It also demonstrates that *Marakis* provides no objective standard upon which to base such a conclusion. Rather, when considering this issue the trial judge has the essentially unfettered discretion either to jump on the bandwagon of the municipality or the land developer and talk about sixteen studies, or it can look at the heart of the issue being decided, as Friends asserted it should have done, and conclude that the matter in fact is understandable and one as to which a lay person should be allowed to express a policy preference.

Because *Marakis* restricts the implementation of a fundamental constitutional right without any objective standard by which a trial judge can measure the appropriateness of voter participation, the *Marakis* analysis constitutes an impermissible encroachment on this constitutional right. In our view, consideration of the general purpose and policy test also is fraught with potential for a subjective analysis. This significantly subjective standard is unfair, both to trial judges, and more importantly, to the parties to a referendum dispute.[7]

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[7] The second issue that the trial court must consider to measure complexity is whether the zoning changes involves "the practical exigencies of the operation of city

Finally, is complexity even an issue? Not in cities with the strong mayor/council form of government for in those cities, even if the matter has great complexity, the citizens are entitled to a referendum. This Court concluded in *Mouty* that it was "confident that the ability to exercise the referendum power over the full range of zoning matters acted upon by a city council organized under the council-mayor form of government will not wreak havoc upon the smooth operation of municipalities." *Mouty* at ¶ 36. Nor should it wreak havoc in cities operating under any other form of municipal government. *Mouty* also made clear that there are other, restraining checks on the referendum power, including signature requirements and procedural requirements. (*Mouty* ¶ 35). From experience Friends notes that the very short time periods for action also provides a serious, limiting check on the power. In short, having referenda from time to time does not weaken a city nor seriously impair the ability of a city council to govern.

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government." *Marakis* ¶ 13. Said another way, will communities "be subject to the undesirable phenomenon of city government by referenda, an inefficient and often arbitrary system that virtually guarantees piecemeal land development." *Id.* Evidence on this issue also was introduced at trial. Mayor Brady testified that in the nineteen years he had served the City either as City Attorney, City Council Person or Mayor, the City never before had held a referendum. Friends also introduced evidence that the Vision Statement of the City (Ex. 14, Add. 49) explains that an important part of the vision of the residents of the City is that they "are citizens who participate in deciding matters that affect us . . . ." and that they encourage "[a] general vote on issues with city-wide impact." Notwithstanding this evidence, in Finding of Fact No. 36 the trial court quoted the same *Marakis* language about the dangers of piecemeal land development.

iii. *Marakis* is Unworkable Because it Treats Citizens of Some Cities Differently Than Citizens of Other Cities.

In the trial court Friends argued that *Marakis* is unfair because it is discriminatory. The *Marakis* analysis requires a significantly different effort to obtain a referendum from the citizens of some classes of cities and counties than from the citizens of other cities. *Mouty* and this case demonstrate the point. When asked to recognize this difference and the fact that *Marakis* places significantly unequal burdens on referendum sponsors, the trial court simply ignored the matter. That was error which this court should remedy.

As the Court acknowledged in *Mouty*, the *Marakis* test is an "admittedly fact-intensive analysis." *Mouty* ¶ 24. Another word which, in the context of contested litigation, *always* can be substituted for "fact-intensive" is "*expensive*". Unlike the rain, which falls on the just and the unjust, the expense of a *Marakis* analysis only falls on residents of smaller towns and counties, but never on people from the larger cities which operate with the strong mayor/council form of government. For them there never will be the significant *Marakis* expense if a city council adopts a zoning ordinance because under *Mouty* no such analysis is required.[8] What's more, the playbook for smaller cities and

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[8] In the field of quantum mechanics there long has been a discussion of Schrödinger's cat in a sealed box but no one knows if the cat is dead or alive. We know that the hypothetical cat is either alive or dead. But quantum mechanics theory is that, until the box is opened and the cat is observed, it is both alive and dead. Quantum mechanics aside, we know the cat is one or the other; it cannot be both at the same time. Similarly, in this case, the same action taken by two different city councils, cannot be legislative in one city and administrative in the other. In fairness, the same facts must consistently result in one finding or the other. Otherwise, access to constitutional entitlements is random, though we don't live in a random judicial universe. As well, it is unfair for a resident of some cities to have to open the box to find out whether the matter is legislative or administrative, at a cost of tens of thousands of dollars in attorney's fees,

counties which face referendum petitions is to immediately force the matter to court under *Marakis* because the companion of a threat of litigation is the reality of tens of thousands of dollars in attorney's fees. While cities feign confidence in courts and say: "Let's go there;" what they really are saying is: "Do you know how much this will cost?" Cities should be invited, through a clear message from this Court to accept that citizens can make or overrule laws when enough voters have a concern that they satisfy the signature requirements for placing a matter on the ballot.

While, at first blush it may seem logical and appropriate to let courts decide whether a matter properly is referable, the simple threat of doing so creates the specter of significant attorney's fees. In this case it took six trial days and countless other hours of preparation to put on a *Marakis* analysis trial, all so the residents of Mapleton could vindicate their fundamental constitutional right of direct democracy. On the other hand, residents in Salt Lake City, Sandy, Provo, Ogden, West Valley City, and other large cities which operate with the strong mayor/council form of government never have a *Marakis* fight when they seek a referendum. This is because of *Mouty*. The result is a substantially different burden on the constitutional right of direct democracy in a small town than in a larger city; a burden that is unfair and discriminatory.

What is the remedy? For this case the matter is clear. Every time a city adopts a new zone classification it is making new policy and hence new law. The Court should hold that no *Marakis* analysis is needed when a new zone classification is created or a

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while residents of other cities neither have to open the box nor incur the significant attorney's fees.

zone classification is amended. And, as noted in *Mouty*, it can do so without worry that the referendum will "wreak havoc upon the smooth operation of municipalities." (*Mouty* ¶ 35).[9]

V. THE TRIAL COURT ERRED IN CONCLUDING THAT THE NEW ORDINANCE FALLS WITHIN THE GENERAL PURPOSE AND POLICY OF THE ORIGINAL ZONING ORDINANCE.

Although Friends strongly asserts that the Court need not reach *Marakis* for the reasons set forth above, we move to a direct explanation of the error of the trial court when it concluded that Ordinance 2007-17, which adopted the PD-2 zone classification for application to the Gibby property, falls within the general purpose and policy of the original zoning ordinance.

a. The Trial Court's Factual Findings Were Inadequate and Conclusory.

While Friends are mindful of their duty to marshal the evidence pertaining to the trial court's factual findings which are clearly erroneous, and they have done so herein, Utah law is clear that "[a]n appellant . . . is not required to marshal the evidence when the trial court's 'findings are so inadequate that they cannot be meaningfully challenged as factual determinations.'" (Justice Michael J. Wilkins, *A "Primer" in Utah State Appellate Practice*, 2000 UTAH L. REV. 111, 128 (citing *Woodward v. Fazzio*, 823 P.2d 474, 477

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[9] A second problem with the cost of the *Marakis* analysis is that, at a trial, referendum sponsors must put on evidence on all of the four *Marakis* factors. Our law provides no vehicle for piecemeal litigation. Thus, Friends spent six days in trial introducing evidence on each of the *Marakis* criteria. Yet, because of the *Marakis* sequential analysis the trial court was not required to reach the last two factors: material variance and appropriateness for voter participation. But if this case is remanded to the trial court to address those issues then these referendum sponsors may face the prospect of subsequent, piecemeal appellate review.

(Utah App. 1991))). In this case, the trial court's factual findings are inadequate and significantly impair Friends' ability to meaningfully challenge the findings.

In order for the trial court to determine whether the PD-2 zone falls "within the general purpose and policy of the original ordinance [the CE-1 zone]," *Marakis* at 1124, the trial court "[in] applying this element . . . must first determine the general purpose and policy of the original ... zoning category" and then "consider whether the cumulative result of the zoning change at issue . . . falls within the general purpose and policy of the original [ordinance] designation." *Id.* As described above, *Mouty* called this an "admittedly fact-intensive analysis," *Mouty* ¶ 24, in which the trial *must consider "a variety of factors*, including the plain language of the ordinance, council meeting minutes, the intent of the enacting authority . . . and any other reliable and relevant evidence." *Marakis* at 1124 (emphasis added).

In this case, however, the trial court did not look at any of this kind of evidence. Its factual findings are largely conclusory, with no meat on the bones. While, as demonstrated hereafter, extensive evidence was presented regarding the plain language of both the CE-1 and the PD-2 zones and other documents and information which establish and explain the general purpose and policy of the CE-1 zone, there is essentially no mention in the factual findings of any of this beyond what appears in the preambles of the two ordinances. (R. 589–90, Add. 51). A great deal of additional evidence relating to the intent of the enacting authority was introduced in the form of the Vision Statement, the Land Use Element, the General Plan Map, and other documents and testimony. Yet none of this evidence is even mentioned by the trial court in its findings of fact. Simply put,

the trial court's findings of fact are inadequate. Friends should not be required to marshal the evidence to demonstrate how these conclusory and unhelpful factual findings are clearly erroneous.

b. Certain of the Trial Court's Factual Facts are Clearly Erroneous.

Under *Marakis*, the first factor which the trial court considered in determining whether the city council's adoption of an ordinance is a legislative or an administrative act is "whether the newly enacted zoning change falls within the general purpose and policy of the original zoning ordinance." *See id.* at 1124. The trial court concluded that the PD-2 ordinance was within the general purpose and policy of the original zoning ordinance and thus concluded that the council action was administrative in nature and the ordinance was not referable. In reaching this determination the trial court made 36 factual findings. (Add. 1–15). Friends do not take issue with most. But as to several factual findings, we do take issue. The trial court clearly erred in making those findings.

Friends sets forth herein each of the findings of fact which is clearly erroneous and citations to the record and facts which support the particular finding. In section V(c) below, Friends will explain the evidence which demonstrates that the trial court's finding are clearly erroneous.

Finding of Fact No. 8. Pursuant to the MOU, at its duly-noticed and regularly-scheduled City Council meeting on the night of July 17, 2007, Mapleton brought forth proposed text for a zoning ordinance that would apply to the Gibby Property. The proposed new zone, designated as "PD-2," would allow Gibby to develop 47 lots on the

relatively flat, buildable portions of the Gibby Property, *while retaining CE-1 type protections for environmentally sensitive areas of the Gibby Property, especially areas having slopes exceeding 30%.* The PD-2 zone allowed for clustering of homes. Gibby also submitted for City approval, roughly contemporaneously, a preliminary plat of his proposed 47-lot subdivision. (R. 593, Add. 5).

Friends only takes issue with the italicized portion of this factual finding that the PD-2 zone "retain[ed] CE-1 type protections for environmentally sensitive areas of the Gibby Property, especially areas having slopes exceeding 30%."

Finding of Fact No. 22. The evidence showed that Ordinance 2007-17 created a new zoning classification with a site specific focus to accommodate a specific development *and did not constitute a comprehensive change to the zoning statute.* (R. 590, Add. 8).

Friends only takes issue with the italicized portion of this factual finding that the PD-2 zone "did not constitute a comprehensive change to the zoning statute."

Finding of Fact No. 30. The purpose and objectives of the CE-1 zone and the PD-2 zone are similar. (R. 589, Add. 9).

Friends only takes issue with the conclusion (not really a factual finding based on any identified evidence) that the purposes and objectives of the two zones are similar. In broad senses they are similar. However, with only a statement that the two ordinances are similar, but no statement of how they are similar, this finding is a completely unhelpful conclusion, not a factual finding.

Finding of Fact No. 31. The enactment of the PD-2 zone maintains many of the provisions of the CE-1 zone. (R. 589, Add. 9).

Friends acknowledges that the PD-2 zone maintains some of the provisions of the CE-1 zone. They both apply to the same area, provide for residential development in the area, and contain certain provisions dealing with environmental protection. (Ex. 15, Add. 51). But like Finding of Fact No. 30, this is a conclusion not based on any identified evidence.

Finding of Fact No. 32. These similarities include provisions on clustering, a "buildable area" concept, and *verbatim slope protection requirements*. Further, Mapleton City maintains the ability to grant or deny permits in the PD-2 zone and the ability to scrutinize the development the same as if it were under the CE-1 zone. (R. 589, Add. 9).

Friends acknowledges that this finding puts a tiny bit of skin on the bare bones of Findings No. 30 and 31. Friends takes issue with the italicized portion of this finding that the PD-2 zone contains "verbatim slope protection requirements."

The aforementioned findings of fact are supported by the testimony of Mayor James Brady, the then Mapleton City Mayor; by the testimony of Cory Branch, Planning Director for Mapleton City; and by certain of the exhibits. Specifically Mayor Brady testified that the City intended to draft a specific ordinance that would be applicable to the Gibby Property. (Tr. 594–99, 616–17). He also testified at length regarding the similarities in the PD-2 zone and the CE-1 zone. (Tr. 758–64). Mr. Branch testified that he felt that the PD-2 zone was consistent with the text of the CE-1 zone. (Tr. 344). He

testified that the enactment of the PD-2 was consistent with the CE-1 in that its intent was to avoid development on environmentally sensitive lands in Mapleton by prohibiting development in lands with a slope of more than 30 percent. (Tr. 345). He testified that the PD-2 zone required a permit for any grading, plowing, excavating, cutting, or filling. (Tr. 347–48). He testified that the City was required to make a preliminary determination regarding erosion, flooding, or landslide concerns prior to granting a permit for such activities. (Tr. 348–49). He testified that the PD-2 zone was essentially a mixture of the City's RA-1 zone and the City's CE-1 zone. (Tr. 350). He testified that he understood that the language of the CE-1 zone relating to slope protection was repeated verbatim in the PD-2 zone. (Tr. 353). And he testified that the creation of the PD-2 zone was not meant to be a relaxation of development standards. (Tr. 368–69). Additionally, a great deal of documentary evidence was introduced and referred to in the form of Exhibits 3, 4, 5, 6, 7, 104, 105, 110, 111 and 112. Mapleton City introduced and referred to these exhibits at length to establish the similarities between the original CE-1 zone and the PD-2 zone.

Finding of Fact No. 29. It has been established that through numerous individualized studies done on the Gibby property, many of these concerns have been alleviated and that much of the Gibby property is not subject to the same type of geological and geotechnical hazards contemplated by the CE-1 zone. (R. 589, Add. 9).

Finding of Fact No. 33. Mapleton City Council Meeting minutes indicate that the consideration of potential geotechnical hazards was considered in enacting the PD-2 zone. (R. 588, Add. 10).

Finding of Fact No. 34. The Gibby Property is not subject to the same type of geological and geotechnical hazards as contemplated by the CE-1 zone. Studies taken resolved Mapleton City's CE-1 based concerns. (R. 588, Add. 10).

Finding Fact No. 36. It also should be noted, this Court relies on *Mouty* in that it is "hesitant to hold that an unqualified referendum right extends to municipal considerations involving necessarily complex issues, as the resolution of such matters may be best left to the mechanisms generally employed by municipal governments." *Mouty* ¶ 32. "If cities are to function efficiently, citizens must recognize that there are certain governmental areas in which the need for continual change necessitates an expeditious means of decision making. Otherwise, communities will be subject to the undesirable phenomenon of city government by referenda, an inefficient and often arbitrary system that virtually guarantees piecemeal land development." *Marakis* at 1125.

Findings of Fact Nos. 29, 33, 34, and 36 all are findings that address the sixteen studies which Mr. Gibby introduced in order to demonstrate the complexity of the matter so that he could establish that this matter was not appropriate for voter participation, the last of the *Marakis* factors. However, because the court resolved the matter at the general purpose and policy leg of the *Marakis* analysis, and because *Marakis* is a sequential analysis, the court did not need to reach the issue of appropriateness for voter participation. Thus each of these four factual findings is irrelevant.

Notwithstanding, these four findings of fact are supported by the testimony of Robert Gunnell who testified that the studies demonstrated that there were some secondary faults, but that there was nothing that couldn't be appropriately handled with

the offset requirements that the State of Utah requires. (Tr. 708). Additionally, William Turner testified about the many studies that Earthtec Engineering conducted on the Gibby Property, including where the fault traces run. (Tr. 789–812, Exhs. 206–21).

However, Mayor Brady also testified that neither he nor the Mapleton City Council reviewed or read the reports prepared regarding the Gibby Property, but rather, were presented with oral or written summaries of the reports from the City Engineer, Robert Gunnell. (Tr. 734–35).

The conclusion of the foregoing analysis is that there are several factual findings which are completely irrelevant, several that are so conclusory as to be completely unhelpful and not really susceptible to providing a basis for the trial court's conclusions of law, and only a very few with which Friends actually disagrees. As to those few we have marshaled the evidence. We now turn to a demonstration that the trial court clearly erred in its factual analysis.

c. The Facts Introduced at Trial Clearly Demonstrate That the General Purpose and Policy of the New Zone Does Not Fit Within the General Purpose and Policy of the Existing Zone.

Marakis asks the question, first, "whether the newly enacted zoning change falls within the general purpose and policy of the original zoning ordinance." *Marakis* at 1124. This analysis requires a comparison and contrast of the purpose and policy of the existing zone, in this case the CE-1 zone, with the new zone, the PD-2. More than that, however, this also requires a comparison and contrast of the purpose and policy of the existing PD zone and the new PD-2 zone. Because the PD-2 zone was replacing the CE-1 zone, those

two zones must be contrasted. And because the PD-2 zone was implemented within the existing framework of the PD zone, those two zones also must be contrasted.

As is seen from a review of his limited factual findings, the trial judge based his conclusion that the new zone falls within the general purpose and policy of the CE-1 zone almost exclusively by reference to the preambles of the zone text of the CE-1 and PD-2 zones. (Ex. 15, Add. 1–15). This evaluation was far too narrow in scope.

While the court must consider what the CE-1 zone text says about the policy and purpose of that zone, by overlooking the significant, unrebutted evidence introduced at trial that explains the underlying public policy of the City's zoning scheme, the court, essentially, missed the forest for the trees.

The City's policy with respect to development in the CE-1 zone is found in four primary sources, only one of which even was referred to by the court in its findings of fact:

1. The Vision Statement

The City has adopted a Vision Statement which explains the City's policy with respect to growth and development. (Ex. 14, Add. 49). The Vision Statement provides that the City retains "a peaceful, country atmosphere through rural master planning." As stated in the Vision Statement, the City "[e]ncourage[s] . . . [p]reserving the beauty of Maple Mountain," while the City "[d]iscourage[s] . . . [d]evelopment on the mountainsides."

2. The Mapleton City General Plan – Land Use Element

The City implements the broad policy positions of the Vision Statement through a document which it calls the "Mapleton City General Plan – Land Use Element" (hereafter "Land Use Element"). (Ex. 1, Add. 16). The Land Use Element is an official document of the City, reflecting the growth and development plan for the City. It was adopted by ordinance and thus has the force of law. (Ex. 1, Add. 16). Coincidentally, the Land Use Element was adopted in its present form on August 21, 2007, the same night and in the same city council meeting that the PD-2 zone was adopted. (Ex. 1, Add. 16). The Land Use Element explains, in the first paragraph of the first page under the heading "Land Use Categories" that:

> *In order to create an organized and beneficial growth pattern for future development in Mapleton City* and for areas which have yet to be annexed, the Land Use Element includes desired future land use patterns and accounts for the impact the new development will have on the community. It is the intention of Mapleton City to plan for these areas to be compatible with adjacent land use patterns and existing zoning designations. In order to do so, general land use designations have been assigned to areas in the city . . . . Each of these designations is described in this section and can be found on the Mapleton City Land Use Map.

(Emphasis added) (Add. 16).

After this introductory section, the Land Use Element explains that it "has been developed to meet the following factors: 1. The Vision Statement and other citizen input opportunities *which incorporate residents' desires*; 2. Preserve rural character while managing the growth in Mapleton; 3. Water Availability; 4. Sewer availability; and 5. Road availability." (Emphasis added) (Add. 16).

The Land Use Element then describes ten different land use designations and identifies the zone classifications which fit within each land use designation. (Add. 17–19). Curiously, the PD zone classification only was deemed to fit within the High Density Residential and General Commercial land use designations and was not considered an appropriate zone classification for the Critical Environment land use designation. (Add. 19).

Finally, the Land Use Element, in describing the Critical Environment land use designation, explained that:

> Development of sensitive areas, such as steep slopes, flood plains, ridge lines, aquifer recharge zones, fault zones and other areas containing geologic hazards will be avoided to the extent possible. It is the city's desire to transfer bench development rights to locations off the bench. If property owners desire to develop their land rather than sell their development rights, lots for single family homes should be at least 3 acres in size, in order to reduce impact on the land. Building sites should be located on geologically safe parts of each lot, and shall not include natural slopes over thirty percent.[10]

3. Mapleton City General Plan 2007 Map

The Land Use Element was accompanied by the Mapleton City General Plan 2007 Map (hereafter the "General Plan Map"). (Ex. 2, Add. 20). The General Plan Map also was adopted by ordinance on August 21, 2007. It identified in a visual format the placement of each land use area in the City.[11]

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[10] Exhibit 1, ¶ 10 (Add. 16). Exhibit 111 demonstrates that development rights for a large number of parcels in the CE-1 zone have been transferred to sites located elsewhere in the City. Yet for Mr. Gibby's property the City is not encouraging transfer of development rights off the bench.

[11] For reference, the High Density Residential land use area is a copper color and is found in small chunks near the far north and far south of the City and in a large area along the

Read as a whole, the Land Use Element and the General Plan Map clearly identify a City purpose and policy to have any PD developments only in General Commercial and High Density Residential land use areas in the City, both of which land use areas are far from the CE-1 area. The two documents also demonstrate the policy of the City to keep significant development out of the Critical Environment land use area by use of the transfer of development rights to other locations of the City. Finally, these two documents demonstrate the policy of the City to require, to the extent development in fact occurs in the Critical Environment land use area, large lots with minimal hillside impact.

4. CE-1 Zone Text

Section 18.30.010 *et seq.*, of the Mapleton City Code contains the text of the CE-1 zone. (Ex. 3, Add. 21). The trial court found that the legislative intent and general purpose and policy of the CE-1 zone are set forth in Section 18.30.010 of the Mapleton City Code (the first section of the CE-1 zone text). That intent and purpose included a commitment to protect environmentally sensitive and fragile areas within the city and to allow development which balances the preservation of the environment with the protection of subsequent purchasers and occupants and the rights of owners to reasonable use of their property. (Ex. 3, Add. 21). To meet this purpose the zone also had as a purpose encouraging location, design, construction of uses and development projects with maximum safety and human enjoyment consistent with efficient and economical uses of public services and facilities and the natural limitations of the land and the protection of

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west side of the City. The General Commercial land use area is in red and is located along US Highway 89 as it passes through the City. The Critical Environment land use area is the large tan area all along the eastern boundary of the City.

the environment. (Ex. 3, Add. 21). The ordinance then expressed the conclusion that because of the fragile nature of the land in this zone, special conditions and requirements would be attached to developments in the zone and that the requirements of the zone are the "*minimum required* in order to accomplish the purpose and intent for which this zone was established." (Emphasis added) (Ex. 3, Add. 21). Thus the City adopted, as a part of the policy and purpose of the zone, absolutely needed, minimum requirements for the zone.

Jim Lundberg testified at length regarding the textual differences between the CE-1 zone and the PD-2 zone. This testimony was largely unrebutted. In his testimony Mr. Lundberg pointed out many plain, obvious and critical differences between the two zones. Specifically, Mr. Lundberg testified that the CE-1 zone required that minimum lot sizes be not less than three acres; (Ex. 3, Add. 23) that building lots have minimum lot widths of 250 feet; (Ex. 3, Add. 23) that all buildings be set back from the Bonneville bench ridgeline at least 250 feet; (Ex. 3, Add. 24) that no structure intended for human occupancy may be located over a fault trace or zone; (Ex. 3, Add. 25) that no grading occur on the property without a grading permit issued by the City; (Ex. 3, Add. 29) and that all land having a slope of 30% or greater must remain in its natural state without grading, except the landowner could plant additional vegetation or sprinkler irrigation. (Ex. 3, Add. 30). He also pointed out that "[i]n areas having a slope of greater than 30%, accessory buildings such as barns [etc.] . . ." (Ex. 6. Add. 41) are permitted as conditional uses.

These are significant and critical minimum requirements incorporated into the general purpose and policy of the zone as set forth in subsection (E) of the statement of intent which serves as the preamble for the zone text. Yet, as is clear from Exhibit 15 and lengthy testimony of several witnesses, including Mr. Lundberg, none of these minimum and needed protections are included in the PD-2 zone. (Ex. 15, Add. 51). Thus, the court clearly erred when it concluded that the general purpose and policy of the PD-2 zone is within the purpose and policy of the CE-1 zone. It simply is not.

5. Other Evidence of the General Purpose and Policy

While the primary sources of the general purpose and policy clearly demonstrate a purpose and policy for the CE-1 zone that is at odds with the new PD-2 zone, other evidence also establishes the purpose and policy of the CE-1 zone. For example, when the PD-2 zone was before the City planning commission, the commission recommended against rezone of Mr. Gibby's property. Its explanation for its recommendation speaks volumes about the general purpose and policy of the CE-1 zone. Exhibit 28 is a staff report from the city planning staff to the City Council for its September 18, 2007, meeting. In the report the staff explained that the planning commission recommended that the City Council deny the requested rezone, providing four reasons for its recommendation of denial:

1. That this appears to be an attempt to relax the zoning requirement generally in affect in this area.
2. The property not currently located in the CE-1 Zone certainly is available for development under reasonable guidelines without having to encompass the entire parcel for areas that do not have the same geological layout as the referred to "donut hole" portion of the property.

3. *Does not meet the General Plan.*
4. Considered to be spot zoning.

(Ex. 28, Add. 29) (Emphasis added).

The City planning commission, an advisory body to the City Council, concluded that the new PD-2 zone did not meet the Land Use Element and General Plan Map. This is a clear statement by an official City commission that the purpose and policy of the new ordinance does not fall within the general purpose and policy of the existing CE-1 zone. It also buttresses the claim that the policy and purpose behind the CE-1 zone is explained in other documents in addition to the CE-1 zone text.

Even the Mayor disclosed in correspondence to Mr. Gibby's counsel that the hillside protections of the PD-2 zone "are culled out of the CE-1 zone. . . . Applying them to the land with greater than 30% slope is less onerous than it would be if the CE-1 zone is applied to the remaining 60 acres of land." (Ex. 27).

Finally, Tom Nielson, a Mapleton citizen who was a member of the planning commission at the time the City adopted the CE-1 zone, and was part of a subcommittee assigned by the planning commission to draft the CE-1 zone (Tr. 118–19), testified that the PD-2 zone is a significant departure from the CE-1 zone in that there was no provision for engineering studies or fault identification or the appropriate placement of homes. (Tr. 123).

6. PD Zone Text

The PD-2 zone is a zone created under the imprimatur of the existing PD zone. Thus, consideration of whether the PD-2 zone falls within the general purpose and policy of the PD zone also is an inquiry which the trial judge should have but did not make.

In the zone text for the PD zone the City announced a policy that the PD zone classification and the adoption of zone classifications under the PD zone is not intended for circumstances where development is reasonably feasible under an existing zone classification and the PD zone is not available to increase densities or relax development standards. (Ex. 105, Add. 81). Notwithstanding this statement of policy and purpose by the City, the new PD-2 zone was prepared contrary to that policy. As the planning commission concluded, the new zone was "an attempt to relax the zoning requirement generally in affect (sic)." (Ex. 28, Add. 79).

As well, there is no question that the PD-2 zone significantly increased densities that were available under the CE-1 zone[12] which also is inconsistent with the policy and purpose described in the PD zone. In short, not only does the PD-2 zone not fit within the general purpose and policy of the CE-1 zone, it also does not fit within the general purpose and policy of the PD zone.

In summary, the following facts clearly and unmistakably demonstrate that the PD-2 zone does not fit within either the CE-1 zone of the PD zone. First, the City has a vision that encourages preserving the beauty of Maple Mountain and discourages development on the mountainsides. In adopting a zoning plan, the City established land

[12] The CE-1 zone allowed densities of one lot per three acres. The PD-2 zone allowed lot sizes as small as one-half acre and an overall density of one lot per acre.

use designations which are a statement of the policy of the City. With respect to the Critical Environment land use area, where the CE-1 zone is located, the City said that it prefers that development rights be transferred off of the bench to other areas of the City, that lot size should remain at three acre minimums, and that no development take place on natural slopes over 30%.

The PD zone is described in the Land Use Element as being suitable only for High Density Residential and General Commercial land use areas, yet the PD-2 zone is proposed for placement in the Critical Environment land use area. Additionally, the PD zone is not intended for areas where development is reasonably feasible under existing zoning and it is not intended to relax zoning standards or increase densities.

Against all of these policies, the PD-2 zone is placed into a land use area not previously designated as appropriate for PD zones; it provides for lot sizes as small as one-half acre when the CE-1 and the Critical Environment land use area required three acre minimum lot sizes; it skipped the salutary purpose of encouraging transfer of development rights off of the bench area; and, completely inconsistent with all prior policy of the City, it allowed construction of all but primary residences in the areas with slopes greater than 30%. In short, the court was way wide of the mark in its narrowly focused and erroneous conclusion that the PD-2 zone fits within the general purpose and policy of the CE-1 zone.

All of the foregoing evidence was admitted at trial, largely without opposition from the other parties. Notwithstanding its admission, the trial court erred. Instead of looking at this evidence as a whole, instead of looking at the large variety of sources of

evidence which *Mouty* says should be considered in this fact-intensive analysis, the trial court myopically concluded that the PD-2 zone fits within the general purpose and policy of the CE-1 zone. As a matter of law, a trier of fact cannot cherry pick from among a very narrow subset of evidence, ignoring the vast whole of the evidence, all of which demonstrates significant differences in the general purpose and policy of the CE-1 zone and the PD-2 zone. That error cries out for a remedy from this Court.

In addition to focusing almost exclusively on the CE-1 zone text, the trial court also concluded that the important provisions of the CE-1 zone with respect to geotechnical hazards was not important any longer as the numerous studies introduced by Mr. Gibby demonstrated that the Gibby property is not subject to the same type of geological and geotechnical hazards as contemplated in the CE-1 zone. (Finding of Fact 34, R. 588, Add. 10). This conclusion not only is in error, it also is irrelevant in the *Marakis* analysis of general purpose and policy. By making these factual and legal conclusions the trial court essentially was bootstrapping its way past a meaningful general purpose and policy analysis. Instead, the trial court simply concluded, without any analysis, that "[s]tudies taken resolved Mapleton City's CE-1 based concerns." (Finding of Fact 34, R. 588, Add. 10).

The Vision Statement, the Land Use Element and the General Plan Map each speak clearly and directly about the City's purpose and policy for development in the CE-1 zone. The PD zone explains the policy for creation of new PD zones such as the PD-2 zone. Yet, the trial court gave no consideration to any of this additional evidence. Under this part of the *Marakis* analysis the trial court is obligated to contrast the purpose

and policy of the zone that is being amended or replaced with the purpose and policy of the new zone. But in making this evaluation, a trial court is not limited solely to the zone text of the zone classification at issue. Rather it must look at all relevant evidence which explains, expounds, and elucidates the purpose and policy of the zone at issue. In this case, had the trial court undertaken this appropriate and broader review, it would have reached a different result. It did not and this Court must correct that error.

CONCLUSION

Based upon the foregoing, this Court should reverse the trial court's decision as set forth herein.

REQUEST FOR HEARING

Appellants hereby request oral argument because it will materially assist this Court in resolving the issues in this case.

DATED this 16 day of January, 2009.

KIRTON & McCONKIE

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January 2009, I caused to be delivered by the method indicated below a true and correct copy of the **BRIEF OF APPELLANTS** to the following:

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